U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 03 2005
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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

According to the petition, the petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. Also according to the petition, the petitioner seeks employment as a postdoctoral research fellow. As indicated on the petition, the petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits two briefs, one disputing the conclusions of the director and another asserting that the petitioner intended to seek a higher classification pursuant to section 203(b)(1)(A) of the Act, relating to aliens of extraordinary ability, and that the record demonstrates her eligibility for that classification.

The petitioner's initial cover letter does indicate that the petitioner intended to seek the more exclusive classification pursuant to section 203(b)(1)(A) of the Act. On appeal, the petitioner submits two letters purportedly submitted to the director after the petitioner received the notice of action indicating her petition was being considered under the lesser classification under section 203(b)(2) of the Act. The letters both request classification under section 203(b)(1)(A) of the Act. Neither letter appears in the record other than the copies submitted on appeal.

On September 8, 2003, the director requested evidence relating to section 203(b)(2) of the Act. In response, the petitioner addressed the requirements of that classification and the director ultimately concluded that the petitioner had not demonstrated eligibility for the lesser classification. Given the indication on the petition that the petitioner was seeking the lesser classification and her response to the director's request for additional evidence addressing the requirements for that classification, we find that the director did not err in adjudicating the petition pursuant to section 203(b)(2) of the Act. We will not make a finding of first impression regarding eligibility under section 203(b)(1)(A) of the Act, but note that it is a more exclusive classification, requiring national or international acclaim, than the one sought and discussed below.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

It appears from the response to the director's request for additional evidence that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Ph.D. in computer aided design from Hong Kong Polytechnic University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, bioinformatics and artificial intelligence, and that the proposed benefits of her work, improved ability to analyze and identify

various proteins through a bioinformatics approach and improved understanding of proteome development, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The petitioner submits evidence of her professional memberships and recognition from universities and the Chinese government. First, the petitioner's memberships are "student/training" memberships or are with large, non-exclusive associations. These memberships do not appear based on the petitioner's record of success in the field. Second, the petitioner's university recognition appears to be honors and scholarships based on academic achievements. Academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. In all cases the petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 219, n.6. The recognition from the Chinese government does not mention the petitioner by name. Regardless, professional memberships and government recognition are two criteria for aliens of exceptional ability, a classification that normally requires a labor certification. We cannot conclude that meeting two, or even the requisite three, warrants a waiver of that requirement.

In addition, as noted by the director, some of the petitioner's references discuss the difficulty in finding researchers with the petitioner's credentials in the United States. The director correctly noted that the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221. Counsel acknowledges this principle on appeal, but asserts that the record goes beyond this claim, demonstrating the petitioner's personal accomplishments in the field.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner obtained her Ph.D. in computer aided design at Hong Kong Polytechnic University under the supervision of [redacted] Frazer.[1] [redacted] explains that the petitioner's Ph.D. work "seriously investigated the application of generative and evolutionary techniques in the design field using genetic algorithms originating from the US but applied in a novel way in a new field." He continues that the petitioner and her colleagues "are the first to have successfully applied genetic algorithms and artificial intelligence technologies into industrial product design process." [redacted] asserts that this work "is highly regarded in the research community" and that a team at the Massachusetts Institute of Technology (MIT) is "taking up this theme." The record contains no evidence that the petitioner's Ph.D. work has been cited or otherwise applied in the field of computer aided design. The record lacks letters from researchers at MIT who have applied the petitioner's ideas.

[1] The petitioner indicated on the Form ETA-750B that she obtained her Ph.D. in September 2001 and began her postdoctoral fellowship in July 2002. The petitioner's degree, however, is dated November 2002.

At the time of filing, the petitioner was a postdoctoral researcher at the Cole Eye Institute of the Cleveland Clinic Foundation in the laboratory of [redacted] Director of the institute, discusses the petitioner's diversified experience and her work at the institute relating to data management and mining. Specifically, the petitioner created "relational databases using evolving vision related proteomics data" and developed "knowledge based computational tools to help researchers related important factors in proteomics to ocular diseases." The petitioner also contributed to "building a retinal pigment epithelium [(RPE)] database, which is a significant asset in our efforts to determine the protein content of the Interphotoreceptor (IPM) matrix."

[redacted] describes the petitioner's RPE work as a "small but significant breakthrough in ophthalmic proteomics and important to US public health because the RPE is a critical tissue for normal retinal function." He continues:

> The bioinformatic methodology she helped develop for this project involves electronic assembly of experimental data, computer comparisons of experimentally derived mass spectra with theoretical mass spectra from known sequences in the human genome, evaluating the quality/validity of the database, and database curating (i.e., updating accession numbers, preventing redundant entries, maintaining informative web-links for each entry, etc). For example, the RPE study mentioned above identified 278 proteins and provides a starting point for building a much larger database of the human RPE proteome.

[redacted] an assistant professor at the University of North Dakota who collaborated with the petitioner at the C[redacted]e, expands on this project. He explains that the petitioner "creatively implemented Error Tolerant Searching technique, for database matching of uninterrupted tandem mass spectrum data." Utilization of this technique results in a searching accuracy that is "increased from 60% to 80%." [redacted] also discusses the petitioner's design of a protein interaction network database to store full descriptions of interactions, molecular complexes and pathways based on the human-bovine comparative sequence analysis performed by her group.

[redacted]urther describes the petitioner's ongoing research to "test the hypothesis that protein oxidative modifications contribute to drusen formation and Bruch's membrane thickening in Aged-related Macular Degeneration (AMD)" as "another significant contribution." The record does not reveal, however, that the petitioner had produced any results on this project as of the date of filing.

[redacted] staff scientist and project leader at AppliedBiosystems, asserts that the petitioner has also contributed to her field by combining "bioinformatics and molecular modeling techniques for drug design applications." [redacted] sserts that no other software exists to match the petitioner's results. [redacted] continues:

> Although her work is primarily designed for her own laboratory environment, it is promised to have the great potential of becoming a major scientific tool for much wider bioinformatics study field [sic], rather than just in the RPE proteomic research. Her work has attracted several national bioinformatics funds' attention, and during her recent presentations to some

biomedical research institutes and companies, they all showed great interest to further cooperate and develop this technique together.

While [redacted] works for a biotechnology company, he does not indicate that his own company has expressed interest in cooperating with the petitioner or licensing her software. The record lacks letters from biotechnology or pharmaceutical companies addressed to the petitioner or her supervisor expressing an interest in licensing or otherwise applying the petitioner's software.

[redacted] an associate member of the Crystallography Research Program at the Oklahoma Medical Research Foundation, asserts that he knows the petitioner from her publications and attendance and scientific meetings. He explains that other institutions applying informatics to protein research "emphasize the theoretical or conceptual design." Thus, their "practical function and application of their work is comparatively weak." The petitioner's work, however, includes "a database, knowledge base, artificial intelligence, computer graphics, a series of computational algorithms, and dynamic simulations" that "can be applied to managing, analyzing and identifying various kinds of proteins that affects a wide verity [sic] of human diseases." According t[redacted]her technique "is the only complete approach that is designed for both direct application and basic research."

[redacted] a professor at the Institute of Chemistry, Chinese Academy of Sciences, provides similar information to that discussed above. While he predicts significant applications for the petitioner's work, he does not claim to have applied the petitioner's work or provide examples of independent laboratories that have done so.

[redacted] Head of the Nuclear Research Group at the Department of Computer Science, University College, London, is the only computer science expert independent of the petitioner to provide a reference letter. [redacted] asserts that the petitioner "has played [a] crucial role in the development of artificial intelligence and computational technology, especially the implementation of Genetic Algorithms, Computational Graphics and Artificial Intelligence technologies to industrial product design, and dynamic molecular structure modeling, as well as the simulation of the evolutionary process of protein structure and function." He further asserts that the petitioner's work has impacted drug design, but provides no examples. Regarding the petitioner's knowledge base system developed at the Cole Eye Institute, Dr. Bentley discusses the potential uses of this system, but is ambiguous as to whether it is actually being accessed beyond the institute or merely has the potential for that function. The record contains no data establishing how often the petitioner's knowledge base system is accessed from outside the Cleveland Clinic Foundation. More persuasive would be evidence that other designers of bioinformatics systems have expressed an interest in modeling their systems after the petitioner's system.

We acknowledge that the petitioner has authored published articles and work presented at conferences. The director noted that researchers are generally expected to publish their research results and concluded that the petitioner had not demonstrated the petitioner's publication history "greatly exceeds that expected of exceptional scientists." The director noted the lack of evidence that the petitioner's work had been cited. On appeal, counsel asserts that the petitioner should not be compared to exceptional researchers and that the director failed to consider evidence demonstrating the quality of the petitioner's publications. Counsel asserts that the petitioner's articles have been cited in highly prestigious journals, were referenced in

Blueprint and were the subject of reprint requests. Finally, counsel notes that several of the published articles were authored before the petitioner obtained her Ph.D.

We will not presume the impact of a given article based on the journal in which it appeared. Rather, we look for evidence of the impact of the article itself. Most persuasive would be citations of the petitioner's articles for their bioinformatics approach, as opposed to the research the petitioner's computer skills assisted. As noted by the director, the record lacks evidence that independent researchers have cited the petitioner's work. The evidence characterized as requests for reprints consists of photocopies of several business cards. Nothing about these cards establishes that the entities identified on the cards have requested reprints of the petitioner's work. Regardless, while requests for reprints demonstrate an interest in the work requested, they are not as persuasive as actual citations, which demonstrate a reliance on the work cited.

A technology reporter for the British magazine *New Scientist* requested images of product designs resulting from the petitioner's use of genetic algorithms for his story on the subject. The record does not contain the final article on the subject indicating the context in which these images were finally used.

The record shows that the petitioner is respected by her colleagues and has made useful contributions in her field of endeavor. It can be argued, however, that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant at a distinguished institution inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.